Supreme Court, U.S.
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No. 09-862

In The
Supreme Court of the United States

JOHN ANTHONY MAGYAR,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Mississippi

BRIEF IN OPPOSITION

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October Term, 2009

QUESTIONS PRESENTED

I.

WHETHER FIFTH AMENDMENT DUE PROCESS REQUIRES THE TRIAL COURT TO ADVISE CRIMINAL DEFENDANTS CHARGED WITH SEX OFFENSES OF REGISTRATION REQUIREMENTS PRIOR TO ACCEPTING A GUILTY PLEA?

II.

WHETHER THE SIX AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL REQUIRES DEFENSE COUNSEL TO ADVISE CRIMINAL DEFENDANTS CHARGED WITII SEX OFFENSES OF REGISTRATION REQUIREMENTS PRIOR TO ACCEPTING A GUILTY PLEA?

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NO. 09-862

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

JOHN ANTHONY MAGYAR
Petitioner,

versus

STATE OF MISSISSIPPI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

This matter is before the Court on the petition of John Anthony Magyar for a Writ of Certiorari to the Supreme Court of Mississippi, affirming the trial court denial on motion for post-conviction relief after pleading guilty to sexual battery.

OPINIONS BELOW

The opinion of the Mississippi Court of Appeals and the Mississippi Supreme Court affirming the conviction and sentences for sexual battery are reported as *Magyar v. State*, 18 So.3d 851(Miss.App. 2008) and *Magyar v. State*, 18 So.3d 807 (Miss. 2009). The Mississippi Supreme Court opinion may be found as "Appendix 1" and the Mississippi Court of Appeals opinion as "Appendix 14" of Petitioner's request for writ of certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to the authority of 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has identified Constitutional provisions as set forth in the Brief of Petitioner. U.S. Const. Amend. V., VI & XIV.

STATEMENT OF THE CASE

Taken from the opinion of the Mississippi Supreme Court:

> ¶2. After John Anthony Magyar was indicted by a Washington County grand jury for one count of sexual battery, he filed a "petition to enter plea of guilty." His plea petition disclosed the maximum and minimum penalties for the crime of sexual battery, but did not disclose that he would be required to register as a sex offender, and the trial judge did not mention it during the

> plea colloquy. The trial judge accepted Magyar's guilty plea and ordered a pre-sentence investigation, following which he sentenced Magyar to twenty years in prison, with ten years suspended, followed by five years supervised probation. Additionally, the judge ordered Magyar to register as a sex offender.
>
> ¶ 3. Magyar filed a motion for post-conviction relief in the trial court, asserting that his plea and sentence should be set aside for various reasons, including that his guilty plea was not freely, voluntarily and intelligently made, and that neither the trial judge nor his attorney informed him that he would be required to register as a sex offender.
>
> ¶ 4. . . . The Court of Appeals affirmed. *Magyar v. State*, No.2007-CA-00740, 18 So.3d 851, 2008 WL 4308220 (Miss.Ct.App. Sept.23, 2008).
>
> . . .
>
> CONCLUSION
>
> ¶ 12. . . . We also hold that the duty to register as a sex offender is a collateral consequence of a guilty plea. All other aspects of the decision of the Court of Appeals in this matter are adopted herein. Accordingly, we affirm the judgments of the Court of Appeals and the Washington County Circuit Court.

Magyar v. State, 18 So.3d 807, 809 (Miss. 2009).

Defendant now seeks review by this Court with this petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

I.
FIFTH AMENDMENT DUE PROCESS DOES NOT REQUIRE THE TRIAL COURT TO ADVISE CRIMINAL DEFENDANTS OF COLLATERAL CONSEQUENCES PRIOR TO ACCEPTING A GUILTY PLEA?

The Mississippi Supreme Court holding that the duty to register as a sex offender is a collateral consequence of a guilty plea and there is no Constitutional requirement that the trial court inform defendant of the duty to register, is based upon interpretation of State law and consistent with the U.S. Constitutional protections sufficient to satisfy *Brady* requirements. *Brady v. U.S.*, 397 U.S. 742 (1970).

II.
A DEFENSE ATTORNEY'S DUTY TO INFORM CLIENT OF DIRECT AND NOT COLLATERAL CONSEQUENCES OF A GUILTY PLEA IS A REASONABLY OBJECTIVE STANDARD OF PERFORMANCE UNDER *STRICKLAND.*

The law regarding sex-offender registration is varied and defined state-by-state. The "objective standard of reasonableness" for attorney performance under *Strickland* should also be based on the each states interpretation as to the direct or collateral consequence test for guilty pleas.

REASONS TO DENY THE WRIT

I.

FIFTH AMENDMENT DUE PROCESS DOES NOT REQUIRE THE TRIAL COURT TO ADVISE CRIMINAL DEFENDANTS OF COLLATERAL CONSEQUENCES PRIOR TO ACCEPTING A GUILTY PLEA?

The States enacted sex offender registration laws to fulfill the federal statutory mandate created by the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program. 42 USC §14071, et seq. As state statutory enactments, under of principles of federalism, each state's statutory scheme varied considerably from each other.

As would be expected with each states registration law varying from the others, the question of an individual's right to be informed of registration duties upon a plea of guilty are dependent upon each states laws, and case law applications of Constitutional law.

Our federal courts in interpreting these individual state schemes and Constitutional implications have held:

> . . . . **An overwhelming majority of courts, including the South Dakota Supreme Court, that have considered the issue have concluded that a sentencing court's failure to advise a defendant about registration as a sex offender is not grounds for withdrawal of a guilty plea because registration is a collateral, not a direct, consequence of conviction**. . . .
>
> *Whitepipe v. Weber*, 536 F.Supp.2d 1070, 1108 (D.S.D. 2007).

Because the interpretation of whether a defendant's guilty plea is based upon state statutory and case law interpretation there will, inherently, be differences between the several states.

The question then becomes whether each state, regardless of whether the duty to register is a direct or collateral consequence of a guilty plea, fulfills Constitutional protections regarding the voluntariness of the guilty plea.

> . . . **[T]he issue here-whether being ordered to register as a sexual offender is a direct or collateral consequence-is not sufficiently clear cut to permit us to conclude that the state court's decision was contrary to, or an unreasonable application of, *Brady*. Indeed, to the very limited extent that the decisions of the courts of appeals can "guide us in determining what constitutes an unreasonable application" of clearly established Supreme Court precedent, see Wilson v. McGinnis, 413 F.3d 196, 199 (2d Cir.2005), these decisions indicate that no clearly established federal law requires that defendants be informed of the possibility that they could be ordered to register as sexual offenders.** . . .
>
> *Virsnieks v. Smith*, 521 F.3d 707, 716 (C.A.7 (Wis.) 2008)(emphasis added); followed in *Laemmle v. Michaels*, 2009 WL 2602065 (W.D.Pa. 2009).

Consequently, the Mississippi Supreme Court holding that the duty to register as a sex offender is a collateral

consequence of a guilty plea and there is no Constitutional requirement that the court inform defendant of the duty to register, is based upon interpretation of State law and consistent with the U.S. Constitutional protections sufficient to satisfy *Brady* requirements. *Brady v. U.S.*, 397 U.S. 742 (1970).

Consequently, there is no infirmity in the Mississippi Court's interpretation of our state statutes or application of Constitutional protections. The fact that the several States vary in their interpretation on the same question, based on each state's law, does not present a cognizable claim and the petition for writ of certiorari should be denied.

II.
A DEFENSE ATTORNEY'S DUTY TO INFORM CLIENT OF DIRECT AND NOT COLLATERAL CONSEQUENCES OF A GUILTY PLEA IS A REASONABLY OBJECTIVE STANDARD OF PERFORMANCE UNDER *STRICKLAND.*

Recently in *Padilla v. Kentucky,* ____ U.S. ____, (2010)(decided March 31, 2010), this Court held that deportation as a result of a guilty plea was a unique consequence, – being difficult to classify as either a direct or collateral consequence. Consequently, defense counsel must now inform clients whether a plea carries a risk of deportation.

Petitioner, asks this court to adopt a similar rationale and hold that defense counsel must inform defendant of sex offender registration consequences that will follow a guilty plea.

As enunciated in *Padilla*, under the *Strickland* analysis the court must first determine whether representation "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

It is the position of respondent, State of Mississippi, that sex offender registration, with the associated variance among the several states, is sufficiently defined to fit the direct or collateral consequence test. While that duty varies from state to state, it is clear – state by state – what an attorney's duty is to his client. If a state defines or hold 'sex offender registration' to be a 'direct' consequence of a guilty plea; – the duty is to inform the defendant. If a state defines or holds 'sex offender registration' to be a 'collateral' consequence of a guilty plea; – there is no duty to inform the defendant.

Under this application, the law on point is sufficiently delineated to be clear to set an 'objective standard' of performance for defense counsel:

The consequences of which the defendant must be aware before pleading guilty are the "direct consequences" of the plea. *Brady v. United States*, 397 U.S. 742, 755, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) (internal quotation marks omitted). Courts of appeal have generally understood *Boykin* and *Brady* to mean that a defendant pleading guilty must be aware of the direct consequences of the plea but need not be informed of the indirect or collateral consequences of a guilty plea. See United States v. Sambro, 454 F.2d 918, 922 (D.C.Cir.1971) (per curiam) ("We presume that the Supreme Court meant what it said when it used the word 'direct'; by doing so, it excluded collateral consequences."); see also Virsnieks v. Smith, 521 F.3d 707, 715 (7th Cir.2008) ("[A]lthough a defendant must be informed of the direct consequences flowing from a [guilty] plea, he need not be informed of collateral consequences."); Meyer v. Branker, 506 F.3d 358, 367-68 (4th Cir.2007) ("For a guilty plea to be constitutionally valid, a defendant must be made aware of all the 'direct,' but not the 'collateral,' consequences of his plea."), cert. denied, --- U.S. ----, 128 S.Ct. 2975, 171 L.Ed.2d 899 (2008).

Appleby v. Warden, Northern Regional Jail and Correctional Facility, 595 F.3d 532, 541-542 (C.A.4 (W.Va.) 2010).

The law in Mississippi is that sex offender registration

is a 'collateral consequence' to a guilty plea. *Magyar v. State*, 18 So.3d 807, 809 (¶12)(Miss. 2009). As such, counsel's claimed failure to inform defendant of his duty to register as a sex offender was not deficient performance.

Accordingly, the State would ask this court to apply the direct/collateral consequence test as the objective standard of attorney performance applicable to the first prong analysis under *Strickland*.

Padilla found deportation to be 'unique,' and the law clear, succinct and enunciated clearly enough to require defense counsel to inform client regarding the risk of deportation after a plea of guilty *Padilla*, slip op. page 9-11.

Sex offender registration is not subject to such a single controlling federal statutory scheme as is immigration. While there is federal enabling legislation for sex offender registration, – the actual definition, requirements and consequences are left for each state to implement.

Consequently, the law regarding sex-offender registration is varied and defined state-by-state. The "objective standard of reasonableness" for attorney performance should also be based on the each states interpretation as to the direct or collateral consequence test.

Again, the fact that the several States would have a different 'objective' standard for attorney performance in informing criminal defendants of their duty to register as a sex does not present a cognizable claim and the petition for writ of certiorari should be denied.

CONCLUSION

For the above and foregoing reasons the State of Mississippi asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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